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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1406

REVEREND LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,
Petitioners,

vs.

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, members of the Adams County Board of Supervisors,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The gravamen of Respondents' opposition to the Petition for Writ of Certiorari filed in this cause is simply that the appeal is premature and constitutes a piecemeal appeal not decisive of the primary issues involved. A chronology of this case will demonstrate why Respondents urge that this cause should not be reviewed at this time by the Court.

ONE: The United States District Court entered its order on July 27, 1971, providing that the primary elections to be held in Adams County, Mississippi would not be delayed, that said elections would be conducted pursuant to the redistricting plan under attack, that said plan was not racially discriminatory and further that Defend-

ant must, because of malapportionment of population of the Supervisors' Districts within the county, file with the District Court a constitutionally acceptable revised or modified redistricting plan not later than December 1, 1971.

TWO: Plaintiffs filed a motion with the United States Court of Appeals for the Fifth Circuit for an injunction pending appeal or alternatively to have their appeal heard expeditiously, which motion was denied. The Court of Appeals, however, on consideration only of the transcript of testimony and briefs, on the 29th day of July, 1971, entered its interlocutory judgment ordering that the District Court's judgment would "remain in full force and effect subject only to the provisions herein contained". The latter reference was to that portion of the order of the Court of Appeals which directed the District Court not later than May 16, 1972, to enter its order calling a new election at some time thereafter to be conducted under the Court's approved redistricting plan to be filed by Defendants by December 1, 1971.

The Court of Appeals then noted: ". . . *the District Court shall retain jurisdiction of this cause subject only to the provisions hereof,*" and, "We further note, however, that in the absence of the record we do not pass upon appellants' contention that the redistricting of Adams County 'was racially motivated and enacted for the purpose and effect of diluting the voting strength of black voters of Adams County, particularly those residing in old District 4, and of preventing the election of black candidates for office in Adams County.' *This contention will be considered when the case is finally submitted to this Court for hearing on the merits.*"

THREE: Within the time permitted by the Rules, Plaintiffs then prosecuted their appeal addressing it to the "racially discriminatory" feature of the case. Defendants

filed timely their motion to dismiss the appeal as moot, which contention the Court of Appeals dismissed by saying that:

> ". . . Appellees motion to dismiss the appeal, filed in the above styled and numbered cause is hereby denied for the reason that the relief granted in the order of July 29, 1971, was in aid of the appellate jurisdiction of this Court and should remain in effect pending the disposition of the appeal on the merits, which will follow in due course."

The appeal was heard, the case remanded to the summary docket and on January 6, 1972, the Court of Appeals (Gewin, Goldberg and Dyer, JJ.) rendered its decision affirming the decision of the District Court that the redistricting plan was not racially discriminatory. Plaintiffs' subsequent motion for rehearing or in the alternate for a rehearing en banc was denied by order of the Court of Appeals dated February 25, 1972.

FOUR: By motion dated March 1, 1972, Plaintiffs asked that the mandate to issue upon the Court's opinion be stayed pending determination of Petition for Writ of Certiorari. In said motion Plaintiffs describe the relief granted by the Court in its order of July 29, 1971, requiring new elections as *interlocutory*. Plaintiffs further urge that the stay be granted "with the understanding that the petition" will not disturb that interlocutory relief. Defendants-Appellees opposed the motion of Plaintiffs-Appellants for stay of the mandate on the opinion of January 6, 1972, and requested that the mandate on the opinion of July 29, 1971, be recalled in order to reinvest the Court of Appeals with jurisdiction of the entire cause. The Court of Appeals rejected both Plaintiffs-Appellants' motion for a stay of mandate and motion of Defendants-

Appellees for recall of the mandate by order filed March 15, 1972.

FIVE: As instructed by order of the Court of Appeals, Defendants on November 24, 1971, filed a new redistricting plan which complied with all of the constitutional standards. On December 6, 1971, Plaintiffs filed interrogatories addressed to Defendants. By order of the District Court dated January 7, 1972, Defendants' time to answer interrogatories was enlarged by thirty (30) days. The District Court set a pretrial conference on the new plan for the 24th day of January, 1972, at which time the case was continued pending filing of all pleadings. Defendants' answers to interrogatories were filed February 8, 1972. The case involving the new redistricting plan was again set for pretrial on May 2, 1972, and for trial on the merits on May 3, 1972. After trial on May 3, and 4, 1972, and May 9, 1972, the District Court rendered its opinion on May 15, 1972, in which the District Court found that the Defendants' December 1, 1971 redistricting plan has neither the purpose nor effect of being racially discriminatory nor does it dilute or disperse black population concentrations or voting majorities in a manner to be condemned as being a racial gerrymander and further that said plan meets the constitutional standards of the Supreme Court of the United States as announced in the one-man, one-vote decisions. A copy of the opinion of the District Court is attached hereto as Exhibit "A". The District Court's judgment has not yet issued.

The opinion of the District Court directs that the new supervisor elections be conducted under the Defendants' December 1, 1971 plan and that the election be held in conjuction with the November, 1972, general Congressional elections.

SIX: The posture of the entire case now is that jurisdiction of the racially discriminatory feature is with the Court of Appeals subject, however, to a determination of this Court as to whether the requested writ of certiorari will issue. Jurisdiction of the malapportionment count reposes with the District Court.

The District Court has approved, by opinion, Defendants' December 1, 1971 redistricting plan and directed Defendants to call elections for supervisors thereunder. The Court's judgment will shortly issue; thereafter the time for appeal will begin to run. An appeal from this latest decision in the case will present to this Court *all of the issues* involved in this case and will be determinative with finality of all of the rights of the parties.

To accept jurisdiction of only a fragment of the case, that is the racially discriminatory feature only, as requested by Petitioners, leaves undecided the principal issues of the litigation—whether the December 1, 1971 redistricting plan meets all of the constitutional standards as to discrimination and apportionment and whether supervisors must run again before the expiration of the terms of office to which they were elected in November, 1971. Additionally, it should be noted that the first redistricting plan under attack, that is the November 2, 1970 plan, has been discarded entirely and effectively voided for all purposes. Why should this Court now revive a moot issue and know that other important questions involved in the same litigation cannot, at the same time, be resolved?

Respondents submit that Petitioners' requested fragmentary appeal falls squarely within the language and sense of *Bohms* v. *Gardner*, 381 F. 2d 283 (C. A. 8th, 1967), Cert. Den. 88 S. Ct. 1069, 390 U. S. 964, 19 L. Ed. 2d 1164 (1967). There, an aggrieved applicant for disability insurance benefits under a Federal program, after pursuing

unsuccessfully all of the administrative reviews, filed his suit in the United States District Court to compel payment of the claimed benefits. The District Court remanded the case to the Secretary of Health, Education and Welfare for further proceedings but did not order the payment of benefits to Plaintiff. From the latter portion of the judgment the Plaintiff appealed. The Court of Appeals dismissed the appeal saying:

> "The district court merely vacated the Secretary's decision and remanded the case for reconsideration and possibly the reception of additional evidence." 381 F. 2d 285

The Court of Appeals utilized the language of the United States Supreme Court in *Catlin* v. *U. S.*, 324 U. S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911 (1945) in defining a final appeal from which an appeal can be taken:

> "A final decision generally is one which ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment."

And

> "Although the Supreme Court has been liberal and pragmatic, and necessarily so, in its approach to this statute (28 U. S. C. Sec. 1291) and has given it a practical rather than a technical construction . . . finality . . . is the firmly established requirement." 381 F. 2d at 285.

Obviously, the purpose behing this rule is to prevent "piecemeal" or fragmentary appeals which, when taken and decided, will not reach all of the issues of the particular case. Unmistakably, the United States Supreme Court has refused to hear such appeals when this Court observed that by Title 28 U. S. C. Section 1291, "Congress has long

expressed a policy against piecemeal appeals." 381 F. 2d at 285.

In the case on Petition, only one issue will be presented to the Court—whether or not the already discarded November 2, 1970, redistricting plan is racially discriminatory. The other issues evolving from subsequent developments in the case cannot be reached. Assume arguendo, that this Court assumes jurisdiction of the case and reverses the Court of Appeals. In the meantime, substantial preparations for elections will have been made and possibly an election held. The decision then casts a cloud on that election and the redistricting plan under which it was held. The circle of litigation then would require a new redistricting plan and another set of elections, all to accommodate an appeal of a moot issue rather than waiting to hear an appeal of all of the issues which now can be prosecuted in about the same time.

Respondents, therefore, respectfully urge that issuance of the writ of certiorari to the Court of Appeals will permit a fragmentary, premature appeal of a moot issue.

Respectfully submitted,

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CERTIFICATE

Copy of the within and foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari was duly served on the Petitioners, by mailing postage prepaid to Mr. Frank R. Parker, Attorney at Law, 233 North Farish Street, Jackson, Mississippi 39201.

Done and certified this 25th day of May, 1972.

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